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COURT OF CRIMINAL APPEALS
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No. PD–0344–17

In the Court of Criminal Appeals
of the State of Texas

FILED
COURT OF CRIMINAL APPEALS
10/13/2017
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
Appellant / Respondent

v.

JOEL GARCIA,
Appellee / Petitioner

On State's Appeal from Cause No. 20150D00100
Before the 210th District Court of El Paso County, Texas

APPELLEE / PETITIONER'S BRIEF

T. BRENT MAYR
State Bar No: 24037052
Law Office of Brent Mayr, P.C.
5300 Memorial Dr., Suite 750
Houston, Texas 77007
Tel.: 713-808-9613
Fax: 713-808-9991
bmayr@bmayrlaw.com

RICHARD D. ESPER
State Bar No.: 06667500
Esper Law Office
801 N. El Paso St.
El Paso, TX 77002
Tel.: 915-544-3132
Fax: 915-544-4647
richardesperlaw@yahoo.com

ATTORNEYS FOR APPELLEE / PETITIONER

IDENTIFICATION OF JUDGE, PARTIES, AND COUNSEL

The parties to the trial court's judgment are the State of Texas, Appellant, and Joel Garcia, Appellee.

The trial court judge was the Honorable Gonzalo Garcia, Presiding Judge for the 210th District Court of El Paso County, Texas.

Counsel for Appellant at trial were Assistant District Attorneys Denise Butterworth, Rebecca Tarango, and Amanda Enriquez and, on appeal, Lily Stroud on behalf of District Attorney Jaime Esparza, 34th Judicial District Attorney's Office, 500 E. San Antonio, Suite 201, El Paso, TX 79902.

Counsel for Appellee at the pre-trial hearings and on appeal was Miguel J. Cervantes, 1013 Montana Ave., El Paso, TX 79902, Ruth and Eunice Reyes, 4675 Montana Ave., Suite B, El Paso, TX 79903, and on appeal only, Michael Groves, 1012 Esplanada, El Paso, TX 79932.

Counsel for Appellee before this Court are T. Brent Mayr, 5300 Memorial Dr., Suite 750, Houston, TX 77007 and Richard D. Esper, 801 N. El Paso St., El Paso, TX 79902.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now JOEL GARCIA, Appellee in the court of appeals below and Petitioner before this Honorable Court, and files this brief pursuant to Texas Rule of Appellate Procedure 70.1.

STATEMENT OF THE CASE

Joel Garcia, hereinafter Appellee,[1] was charged by indictment with three counts of intoxication manslaughter and one count of possession of a controlled substance.[2] Appellee filed a motion to suppress evidence, namely, blood taken from him at the order of police officers without a search warrant and the results of testing on that blood.[3] After a pre-trial hearing, the trial court granted the motion, entering extensive, oral findings of fact and conclusions of law in support of its ruling.[4] The State appealed pursuant to Article 44.01, Texas Code of Criminal Procedure.[5]

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[1] *See* TEX. R. APP. P. 3.2 ("But if the State has appealed under Article 44.01 of the Code of Criminal Procedure, the defendant is the *appellee*.").

[2] Clerk's Record, Vol. 1 (hereafter CR 1) at 8–11.

[3] CR 1 at 81–83.

[4] *See* Reporter's Record, Vol. 7 (hereafter [Vol. No.] RR) at 56, 95–109, 124; 8 RR 4, 9–15; CR 2 at 587.

[5] CR 2 at 608–09.

On appeal to the Court of Appeals for the Eighth District at El Paso, the court reversed the trial court's judgment, holding that exigent circumstances existed permitting the warrantless blood draw.[6]

STATEMENT REGARDING ORAL ARGUMENT

This Court has granted oral argument in this case and Appellee continues to maintain that oral argument would assist this Court in its decision process. This case involves the trial court's granting of Appellee's motion to suppress blood evidence. The trial court entered extensive oral findings of fact and conclusions of law. These findings, as well as the evidence presented to the trial court, are critical to the judgment in this case and oral argument would assist this Court in understanding the relevant facts.

ISSUES PRESENTED

1. The court of appeals erred by applying a *de novo* standard of review to the trial court's granting of Appellee's motion to suppress evidence, failing to give "almost total deference" to the trial court's findings of fact to support its conclusion that no exigent circumstances existed.

2. The court of appeals erred by considering evidence that was not available to law enforcement at the time of the warrantless taking of Appellee's blood as part of its exigent circumstances analysis.

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[6] *State v. Garcia*, No. 08–15–00264–CR, 2017 WL 728367 at *12 (Tex. App.—El Paso Feb. 24, 2017)(not designated for publication).

STATEMENT OF FACTS

In the early morning hours of December 24, 2014, police and fire department personnel responded to a motor vehicle accident in east El Paso.[7] El Paso Police Department Officer Andres Rodriguez arrived and observed a hectic scene with two vehicles on fire and multiple bystanders, but also noted that there were other officers on the scene.[8] Rodriguez came into contact with Appellee after another officer identified him as the driver of one of the vehicles involved.[9]

Rodriguez noticed that Appellee had bloodshot eyes, slurred speech, and an odor of alcohol; based on those observations, he believed that Appellee was intoxicated by alcohol.[10] This was consistent with Appellee's admission of having three or four beers.[11] Appellee also appeared dazed and had difficulty telling Rodriguez what happened, going back and forth between saying that he was the driver and then stating that he was not.[12]

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[7] 2 RR 20–22. One officer testified he was dispatched at 1:48 a.m. 3 RR 71.

[8] 3 RR 154.

[9] 3 RR 155–58.

[10] 3 RR 155, 159, 181.

[11] 3 RR 186, 198, 220.

[12] 3 RR 156–61.

He ultimately admitted that he was the driver of one of the vehicles involved in the accident.[13]

While Rodriguez intended to subsequently transport Appellee to a local substation to perform field sobriety tests and continue his DWI investigation,[14] a decision was made by emergency personnel instead to transport Appellee to a nearby hospital for examination.[15] El Paso Police Department Officer Steven Torres accompanied Appellee as he went to the hospital while Rodriguez, knowing that Appellee had already refused to provide a blood specimen, went to a local substation to begin the process of obtaining a search warrant to take Appellee's blood.[16]

Working as part of the DWI task force for the El Paso Police Department, Rodriguez testified that he had extensive experience and was familiar with the procedures for obtaining a search warrant.[17] He explained that as a matter of "routine," it takes 30 to 45 minutes to prepare

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[13] 3 RR 160–61.

[14] 3 RR 164–65.

[15] 2 RR 26–29, 24–35; 3 RR 164–65.

[16] 3 RR 73, 90–91, 166–67, 187.

[17] 3 RR 147–48.

the warrant and get it down to the court to present to a magistrate.[18] The magistrate was available from 9:00 p.m. to 6:00 a.m.[19] He further explained that when he got to where the magistrates were located, if there was a line, he could let the judge know that "so he can try to get [him] in front so [they] can get that process done, try to get it done as fast as possible."[20] He was not aware of any procedures that allowed warrants to be faxed or e-mailed to the magistrates.[21]

On the night of the investigation at issue, it took him about 10 to 12 minutes to get to the Pebble Hills substation, arriving there at approximately 2:40 a.m.[22] He then called his sergeant at the scene to obtain additional information regarding the accident, learning that one of the passengers in the other vehicle involved had passed away.[23] Based on the

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[18] 3 RR 149–51.

[19] 3 RR 209.

[20] 3 RR 152.

[21] RR 152–53.

[22] 3 RR 169–70.

[23] 3 RR 171.

information he received, as well as his own recollection, he began drafting his affidavit in support of the search warrant.[24]

EMS meanwhile arrived at the hospital with Appellee at approximately 3:01 a.m.[25] Once at the hospital, while nurses were standing by ready to administer an I.V. to Appellee, according to the attending emergency room doctor, Dr. Gary Kavonian, Appellee was uncooperative and expressly told nurses that he did *not* want an I.V.[26] Accordingly, Dr. Kavonian ordered nurses that Appellee was not to receive any I.V. injection and no such injection was given.[27]

Nevertheless, an off-duty police officer, Raul Lom, who was present at the hospital working as a security officer, observed what was happening, learned of the investigation, and decided to take matters into his own hands.[28]

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[24] 3 RR 171–74.

[25] 2 RR 30, 49, 73–74, 184.

[26] 2 RR 111, 113–14, 121–23.

[27] 2 RR 122, 128–29.

[28] 2 RR 141–42, 148–52.

Lom testified that as he was standing nearby while medical personnel treated Appellee, he saw a nurse with her back to him holding an I.V. bag in her hand.[29] He testified that he could not hear what was being discussed, but he did see "that [Appellee's] head movement indicated the universal movement as no."[30] Around the same time, Lom also began to learn about the accident and investigation through other police officers.[31] Eventually, Lom called and spoke with Rodriguez and learned he was back at the substation preparing to obtain a search warrant.[32]

Despite knowing that a search warrant was in the works, and having previously testified that he had seen Appellee apparently refusing treatment, Lom then testified as to what followed:

> LOM: Then at that moment, since I had been working in the hospital so long I had seen where some patients have come in refusing treatment and because that's what it seemed to me like he was doing. And the nurses keep on coming to talk to him again and over and over sometime. And finally the patient decides to go ahead and get treated.

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[29] 2 RR 147.

[30] *Id.*

[31] 2 RR 148–50.

[32] 2 RR 151

THE COURT: Okay. Hold on. The patient decides to do what?

LOM: To be treated. I'm sorry.

STATE: So in this case, do you express any concerns with regards to the bag you saw to Officer Andy Rodriguez?

LOM: Yes, I did.

STATE: What did you say to him?

LOM: I'm thinking that at any moment they're going to go ahead and put an I.V. in him.

STATE: Okay. And at this time when you convey this information that they're getting ready to do an I.V., have you asked any medical staff to confirm?

LOM: No, I didn't.

STATE: Did you ask the doctor?

LOM: No.[33]

Based on Lom's belief that he was "very certain that any moment it could happen that [Appellee] would be injected with an I.V.," he ordered Torres to instruct medical staff to take a blood sample from Appellee.[34] A

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[33] 2 RR 152–53.

[34] 2 RR 157–59, 164; 3 RR 83.

phlebotomist drew his blood at 3:17 a.m.[35] Lom further explained for the first time on cross-examination that he was concerned that the I.V. could dilute the blood:

> LOM: It has always been discussed that it can dilute the blood. That it can -- I don't know if there's any proof that it can be done, but it's always, they say don't do it because once you go to court it's going to come up --the issue.
>
> DEFENSE: Well, I understand that, sir, but the problem we're having is you just admitted you don't have any medical training?
>
> LOM: That's right. I don't.
>
> DEFENSE: So, you know, this is what they call some type of, *este*, urban legend among police officers that this could occur. In other words what I want to know is, tell me of what specific medical journal or any other medical source that this is true, that this could happen?
>
> LOM: I don't have that, sir.[36]

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[35] 2 RR 184.

[36] Both Torres and Rodriguez also later testified about to this "urban legend." *See* 3 RR 98–99 (Torres); 3 RR 168–169 (Rodriguez). As discussed *infra*, however, one of the leading studies on this topic found the opposite: that introduction of intravenous fluids has *no* effect on blood alcohol clearance.

Officer Torres, who was also present, offered a similar story. He testified that he observed a nurse standing next to a prep table with an I.V. on it and "she looked like she was getting ready to use it."[37] While he tried to confirm with the nurse or other medical personnel whether Appellee was going to receive an I.V., he "didn't get a clear answer."[38] After Lom spoke with Rodriguez, Lom told him that Rodriguez wanted him to order that blood be drawn from Appellee.[39] He testified he believed exigent circumstances existed because, like Lom, he believed that Appellee was going to be injected with an I.V.[40] Accordingly, he ordered a nurse to draw blood from Appellee.[41]

Rodriguez testified that he recalled getting a call from Lom around 3:10 a.m., telling him that "they're going to start to put I.V., maybe medicine on your defendant or your arrestee."[42] Rodriguez, taking Lom's "word as gold," confirmed that he told Lom to tell Torres to take the blood

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[37] 3 RR 78.

[38] 3 RR 79–81.

[39] 3 RR 82.

[40] 3 RR 97–100.

[41] 3 RR 144.

[42] 3 RR 174.

immediately.[43] By the time Rodriguez left the substation and arrived at the hospital at 3:22 a.m., they had already taken the blood from Appellee.[44] He also discovered that Appellee had, in fact, refused to accept any kind of treatment.[45]

The phlebotomist who drew Appellee's blood, Adriana Gandara, also testified regarding the circumstances surrounding the blood draw. She explained that she was present, along with the doctor and other nurses, when personnel brought Appellee into the emergency room.[46] She stated that her job was to draw the blood work "because usually that's what I do."[47] She did not do that immediately, however, because she was waiting for the doctor to examine Appellee.[48] Gandara testified that she then discussed obtaining a blood sample for the police but "one of the officers told me that they didn't have the paperwork" and asked her to

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[43] 3 RR 175, 192.

[44] *Id.*

[45] 3 RR 195, 219.

[46] 5 RR 79–80.

[47] 5 RR 80.

[48] 5 RR 90.

"wait for them to get that."[49] She left but was paged about 20 minutes later to return and draw the blood which she did at 3:17 a.m.[50]

After both sides rested, the trial court heard argument from the defense and then the State. Once the State began its argument, it became immediately apparent when the trial court interrupted the attorney for the State in the middle of her argument that it did not find Lom nor Torres and their account of the facts regarding the "exigent circumstances" to be credible:

> [T]he fact is that exigent circumstances are to be determined on a case-by-case basis. And do you agree, do you not, based upon the evidence here, that -- especially from the phlebotomist, that the reasonableness of Officer Lom's conclusion and Torres's conclusion based upon Officer Lom's, you know, indications that it was imperative, it was now or never, that the blood was -- that there was an I.V. or something going to be drawn, *is totally disbelievable. It's not credible at all*. Especially with -- especially, and *I don't believe Officer Lom's assessment nor officer Torres's assessment*.[51]

The trial court then seized on the fact that "medical personnel including the doctor, including the nurses, all said that they weren't going to draw

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[49] 5 RR 80, 91–92, 97.

[50] 5 RR 80.

[51] 7 RR 12. *See also* 7 RR 13 ("So as far as the exigent circumstances and Lom's assessment and Torres's assessment, it's not credible).

any blood" from Appellee, as well as the fact that officers — not medical personnel — instructed the phlebotomist to draw Appellee's blood.[52] After the State concluded its argument, another attorney for the State and the trial court continued to engage in a dialogue where the trial court again made repeated, explicit findings that it did not find Lom nor Torres to be credible.[53] The trial court then ruled that it was suppressing the blood and evidence of analysis on the blood, specifically stating that the officers violated the Fourth Amendment, that there were no exigent circumstances, and the officers' testimony with regard to their assessment of the circumstances was not credible.[54] It did not do this just once, however.

The trial court again, later in the hearing, made the same ruling, adding to its findings.[55] It noted that it found the testimony of the medical and fire department personnel to be credible, as well as the officers "with regards to the to the establishment of factors in being able to make a

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[52] 7 RR 14.

[53] 7 RR 49–54

[54] 7 RR 56–57.

[55] 7 RR 95–96, 100–09.

determination whether the defendant was intoxicated, therefore enabling them and providing sufficient evidence to justify a blood warrant" and that officers could have obtained a warrant by approximately 3:20 to 3:25 a.m.[56] However, when it came to Lom and Torres, it again reiterated that their account of the facts and assessment of what they believed were exigent circumstances was not credible:

> Which again, leads the Court to believe, based upon the review of the evidence, that at the time that the blood was drawn, there was no exigency and therefore a warrant should have been — or could have had the warrant by that point in time. And even at that point, when he made that indication or indicated to the phlebotomist that they needed to get paperwork, even then they could have gotten a warrant because *at that point there was no blood draw, no I.V. even in question*.
>
> And so the Court again, finds the testimony of the phlebotomist credible. *It does not find the testimony of Officer Lom credible with regards to his determination in his mind that exigency existed to interfere.*
>
> ***
>
> That again, goes to the Court's determination that Officer Lom's testimony and Officer Torres' testimony is not credible concerning the so-called quote, unquote exigent circumstances existing at the time to draw the blood.[57]

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[56] 7 RR 95–96.

[57] 7 RR 106–07.

The trial court also took issue with Lom's and other witness' testimony that the I.V. could dilute or somehow otherwise affect the blood and its alcohol concentration:

> And the Court will just make a note on the record that even if – let's say for example, there had been an I.V. performed on the defendant, there's no evidence before the Court, except general speculative evidence, that an I.V. would maybe dilute the blood. To what extent, there was no evidence involved.[58]

At the conclusion of the hearing, the trial court then, for the third time, restated its ruling, suppressing the blood and any analysis of it due to officers obtaining it without a search warrant or exigent circumstances, and, once again, found that Lom and Torres were not credible.[59]

Then, in an apparent effort to not leave any doubt about its ruling, the trial court reconvened the parties a week later to supplement its ruling and findings. It again cast doubt on Lom and other witness' testimony that the I.V. would dilute or otherwise affect the blood, but then stressed again that there was no evidence that Appellee was going to receive an

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[58] 7 RR 105.

[59] 7 RR 124.

I.V.[60] Immediately thereafter, the trial court brought up for the first time throughout the entire proceeding the matter of Appellee being charged also with possession of a controlled substance, namely, cocaine, questioning when and where it was found.[61] The attorney for the State responded by stating that after Appellee was taken into custody, a booking cashier at the jail who was counting money in Appellee's wallet found the cocaine there.[62] Otherwise, there was no other mention of cocaine anywhere else in the record by any witness. The blood test results, admitted as State's Exhibit 16, reflected that analysis conducted on Appellee's blood and issued by the lab on April 8, 2015 — more than three months after the night of the accident — showed the presence of 0.13 milligrams per liter of benzoylecgonine, a metabolite of cocaine.[63] The State offered no testimony or evidence to explain what that substance was or did in terms of causing any impairment.

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[60] 8 RR 13–14.

[61] 8 RR 15.

[62] *Id.*

[63] See State's Exhibit 16, admitted at 3 RR 69 and located on page 271 of the PDF version of Volume 9 of the Reporter's Record.

SUMMARY OF THE ARGUMENT

The trial court granted Appellee's motion to suppress the warrantless taking of his blood. More importantly, the trial court rejected the State's exigent circumstances justification and made multiple, explicit findings of fact to support its ruling. This included finding that medical personnel were unequivocally *not* going to inject Appellee with an I.V. and that the police officers' belief otherwise, thus leading them to believe they were faced with exigent circumstances, was *not* credible. It also found that, even if Appellee were to receive the injection, the officers' belief that this I.V. would have contaminated or "diluted" the blood was entirely speculative and without any basis or evidence to support it.

Despite these findings of historical fact, the court of appeals erred by failing to give almost total deference — much less any deference — to them. Instead, it engaged in its own *de novo* review of the evidence presented and, based upon certain evidence which the trial court found to be not true nor credible, found that exigent circumstances justified the warrantless blood draw. Then, only adding to the error, it relied upon the fact that Appellee's blood contained cocaine metabolite as part of its exigent circumstances analysis when there was no evidence presented to the trial

court to explain what this substance was or did in terms of causing any impairment. More importantly, there was no evidence that officers or any witness believed that Appellee's intoxication was caused by cocaine or cocaine metabolite. The only evidence presented related to either came from a lab analysis issued almost three months after the warrantless blood draw showing only the presence of cocaine metabolite.

ARGUMENT

GROUND FOR REVIEW ONE

THE COURT OF APPEALS ERRED BY APPLYING A *DE NOVO* STANDARD OF REVIEW TO THE TRIAL COURT'S GRANTING OF APPELLEE'S MOTION TO SUPPRESS EVIDENCE, FAILING TO GIVE "ALMOST TOTAL DEFERENCE" TO THE TRIAL COURT'S FINDINGS OF FACT TO SUPPORT ITS CONCLUSION THAT NO EXIGENT CIRCUMSTANCES EXISTED.

A. The court of appeals' *de novo* review of the facts.

The court of appeals started its opinion by recounting the facts presented to the trial court, detailing the testimony of multiple witnesses.[64] It spent almost nine pages doing so.[65] However, nowhere in its opinion did it make as much as a reference to the trial court's multiple findings of fact and conclusions of law discussed *supra*. In fact, the word "findings" is mentioned nowhere in its opinion except in a parenthetical.[66]

Ironically, the court recognized the well-established law that a reviewing court is to give almost total deference to the trial court's findings

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[64] *Garcia*, 2017 WL 728367 at *1–4, slip op. at 2–11.

[65] *Id.*

[66] *Id.* at *5, slip op. at 12 (citing *Evans v. State*, No. 14–13–00642–CR, 2015 WL 545702, at *6 (Tex. App.—Houston [14th Dist.] Feb. 10, 2015, pet. ref'd)(mem.op., not designated for publication), a case that dealt with implied findings where the trial court — unlike here — made no findings of fact or conclusions of law).

of fact.[67] Nevertheless, although the court rejected multiple arguments made by the State to support its theory that exigent circumstances justified the warrantless taking of Appellee's blood, it latched on to the following facts: (1) a nurse was going to administer an I.V. to Appellee, (2) Officer Lom and Torres saw this and believed that Appellee was about to be administered an I.V. or medication, (3) I.V. fluids or medication would dilute or contaminate Appellee's blood, and (4) blood testing analysis showed that Appellee was intoxicated by alcohol and cocaine metabolites.[68] Based on these facts, the court set out its ultimate holding and reasoning in one paragraph at the conclusion of its opinion:

> We therefore conclude that Garcia's circumstances are more akin to *Cole* than to *Weems*. Garcia's accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene. *While his intoxication was induced by alcohol and cocaine metabolites* rather than by methamphetamines, the Higginbotham concern persists. *Introducing intravenous saline or other medication, particularly narcotic medication, would likely compromise the blood sample by impeding the ability to determine the rate of dissipation.* For these reasons, we sustain the State's sole point and reverse and remand for trial.[69]

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[67] *Id.* at *4, slip op. at 11.

[68] *Id.* at *9–12, slip op. at 21–26.

[69] *Id.* at *12, slip op. at 26 (emphasis added).

The irony exists because, of those facts highlighted in the paragraph above, the trial court either (a) found them *not* be true, (b) found them to *not* be credible, (c) found them to be speculative and without any basis or evidence to support them, or (d) never heard any evidence to support them.[70]

B. The well-established law that a reviewing court is to give almost total and complete deference to the trial court's findings of fact.

Twenty years ago, this Honorable Court considered what the appropriate standard of review was for a trial court's ruling on a motion to suppress in the seminal case, *Guzman v. State*.[71] That opinion gave clear guidance that an appellate court is to give "almost total deference to a trial court's determination of the historical facts," as well as "application of law to fact questions" or "mixed questions of law and fact" if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor.[72] This Court drew this conclusion from the Supreme

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[70] Further irony exists because the court also recognized that, "We do not engage in our own factual review of the trial court's decision," and yet did that anyway. *Id.* at *4, slip op. at 12 (citing *Garcia v. State*, 15 S.W.3d 533, 535 (Tex. Crim. App. 2000)).

[71] 955 S.W.2d 85 (Tex. Crim. App. 1997).

[72] *Id.* at 89.

Court decision, *Miller v. Fenton*, which noted that where a judicial actor is in a better position to decide the issue, such as when the issue involves the credibility of a witness, "thereby making the evaluation of that witness' demeanor important, compelling reasons exist for allowing the trial court to apply the law to the facts."[73]

This Court in subsequent opinions expounded on this, noting that, at a hearing on a motion to suppress, the trial judge is the sole and exclusive trier of fact and judge of the credibility of the witnesses as well as the weight to be given their testimony.[74] As this Court explained in *Ross*,

> the judge may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. This is so because it is the trial court that observes first hand the demeanor and appearance of a witness, as opposed to an appellate court which can only read an impersonal record.[75]

Hence, when the trial court makes express findings of fact as the trial court did here, a reviewing court is to view the evidence in the light

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[73] *Id.* at 87 (citing *Miller v. Fenton*, 474 U.S. 104, 114–16, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985)).

[74] *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

[75] *Ross*, 32 S.W.3d at 855.

most favorable to the trial court's ruling and determine whether the evidence supports those findings, again, giving them almost total and complete deference.[76]

This Court recently applied this standard in *Cole v. State*, a case like this one involving the taking of an intoxicated suspect's blood without a warrant and the issue of whether exigent circumstances justified such a taking.[77] In that case, the trial court denied the appellant's motion to suppress, but like in this case, made several verbal findings and conclusions to support its ruling, including the fact that there was "uncertainty of Cole's physical condition and the valid concern that medication administered at the hospital could affect any subsequent blood sample."[78] The court of appeals reversed the trial court's ruling, finding that the record failed to establish exigent circumstances.[79] In regard to the concern over the administration of medication and its effect on the blood

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[76] *Valtierra*, 310 S.W.3d at 447; *State v. Rodriguez*, 521 S.W.3d 1, 8 (Tex. Crim. App. 2017)

[77] *Cole v. State*, 490 S.W.3d 918 (Tex. Crim. App. 2016).

[78] *Id.* at 921.

[79] *Cole v. State*, 454 S.W.3d 89, 101–103 (Tex. App.—Tyler 2014, pet. granted).

sample, the court only noted that there was no evidence regarding the rate of dissipation.[80]

On discretionary review, this Court reversed the court of appeals' judgment. Judge Keasler, writing for the majority, noted several points justifying the exigency including the finding made by the trial court that the officer there "was reasonably concerned that both potential medical intervention performed at the hospital and the natural dissipation of methamphetamine in Cole's body would adversely affect the reliability of his blood sample."[81] Additionally, the officer "was reasonably concerned that the administration of pain medication, specifically narcotics, would affect the blood sample's integrity."[82] Again, this was entirely consistent with the trial court's express findings of fact.

Like the court of appeals in *Cole*, the court of appeals here also failed to give any deference to the trial court's multiple, explicit findings, to support its conclusion that exigent circumstances did not exist. Even

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[80] *Id.* at 102–03.

[81] *Cole*, 490 S.W.3d at 926.

[82] *Id.*

worse, however, is the fact the court of appeals failed to even acknowledge those findings.

C. The court of appeals failed to consider the trial court's multiple, explicit findings that Appellee was *not* going to be injected with an I.V.

The court of appeals' decision to reverse the trial court's granting of Appellee's motion to suppress was predicated on the fact that medical personnel were going to inject or introduce "saline or other medication" into Appellee.[83] The trial court, however, found from the evidence presented that this never was going to happen.

Both a nurse, Elsie Andrade, and the phlebotomist, Adriana Gandara, testified that they were set up and ready to administer an I.V. and draw blood as soon as Appellee arrived at the hospital.[84] However, as Dr. Gary Kavonian testified, Appellee was uncooperative and expressly told nurses that he did *not* want an I.V.[85] Accordingly, Dr. Kavonian ordered

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[83] *Garcia*, 2017 WL 728367 at *12, slip op. at 26.

[84] 2 RR 82, 85 (Andrade's testimony); 4 RR 80, 90 (Gandara's testimony).

[85] 2 RR 111, 113–14, 121–23.

nurses that Appellee was not to receive any I.V. injection and no such injection was given.[86]

The trial court subsequently made its findings consistent with this testimony:

- "And all the medical personnel including the doctor, including the nurses, all said that they weren't going to draw any blood, that the defendant had refused any sort of treatment. He had been refusing treatment since the beginning when the fire personnel picked him up at the scene. He had refused everything and anything and he was being uncooperative. They weren't going to do anything."[87]

- "And then we get into the situation that once that everything has been decided, as far as the medical personnel, that no I.V. is going to be done, no blood is going to be drawn."[88]

- "And that's where the doctor and everybody said, hey, he's uncooperative, we stop treatment. We're not going to take anything, everybody, I.V., blood, nothing."[89]

- "…it corroborates the fact that all medical care concerning blood draw, I.V.s or whatever, had been terminated by the hospital."[90]

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[86] 2 RR 122, 127–29. *See also* 2 RR 85 (Andrade testifying she did not administer the I.V. because she was "told that only scans were going to be done, an I.V. wasn't needed or blood wasn't going to be needed.").

[87] 7 RR 14.

[88] 7 RR 15.

[89] 7 RR 24.

[90] 7 RR 31.

- "He's not receiving treatment from the I.V. and he's not receiving treatment . . . from the phlebotomist. No, he's not because the evidence is clear. They said he refused, we stopped and the next thing I did -- the doctor says is, I ordered a CT scan just to make sure and see if everything was okay. But everything else concerning any treatment had been terminated."[91]

- "But as far as an I.V. being administered, that was never an exigent circumstance based upon the totality of the circumstances and the testimony in this case."[92]

- "I'm just going to make a findings (sic) of fact, and that's going to be my finding of fact. That based upon the evidence, all the evidence that was presented to the Court, all the witnesses, all the witnesses and that, you know, all the medical people, everybody could hear, whatever. The officers were present. The assessment by the medical people. There was no I.V. going to be done. The doctor was not going to assess it. The I.V. person was not going to take it. The blood was not going to be drawn."[93]

- "That the defendant refused any treatment, that the -- according to the testimony of the medical personnel, therefore nothing was taken, no I.V.s, no blood."[94]

- "Especially the medical personnel indicated that there was no blood nor an I.V. to be conducted or was conducted at the time that the blood draw was ordered."[95]

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[91] 7 RR 32.

[92] 7 RR 39.

[93] 7 RR 55.

[94] 7 RR 101.

[95] 7 RR 104.

- "But again, the Court has already found there was never an I.V. going to be given nor was there any blood going to be taken. Because in order for them to even approach the nurses to be able to get the blood, they have to -- all medical treatment with regards to any sort of I.V. or blood draw had terminated because the doctor had already called off any sort of treatment, had called off all the nurses."[96]

All of these were findings of historical fact. Accordingly, the court of appeals was required to give them almost total and complete deference.[97] It completely failed to do so. Instead, the court erroneously relied on the fact that medical personnel were going to administer an I.V to Appellee to conclude that exigent circumstances existed. Because, as the trial court found, that was never going to happen, this provides no support for that conclusion of law.

D. The court of appeals failed to consider the trial court's multiple, explicit findings that Officers Lom and Torres were not credible.

The court of appeals examined this Court's decision in *Cole* at great length before coming to its conclusion that the circumstances here were "akin to *Cole*."[98] While the trial court in *Cole* made an explicit finding

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[96] 8 RR 14.

[97] *Ross*, 32 S.W.3d at 855.

[98] *Garcia*, 2017 WL 728367 at *12, slip op. at 26.

that the officer had a *valid* concern that medication administered at the hospital could affect any subsequent blood sample[99] — a finding that this Court gave almost complete and total deference to in its review of the case[100] — in this case, the trial court found that Officers Lom and Torres' concern that Appellee was going to be injected with an I.V. or something else was *not credible nor reliable* and did so on multiple occasions:

- "It's not credible at all. Especially with -- especially, and I don't believe Officer Lom's assessment nor officer Torres's assessment."[101]
- "So as far as the exigent circumstances and Lom's assessment and Torres's assessment, it's not credible."[102]
- "Based upon the evidence they're not credible."[103]
- "I'm saying that they are not credible in making a determination in their minds that there were exigent circumstances to justify a warrantless blood draw. That's what I'm saying based upon the evidence."[104]
- "But what I'm saying is this, the Court does not believe Officer Lom's assessment that there were exigent circumstances existing at the time based upon the fact that the guy, a defendant, is

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[99] *Cole*, 490 S.W.3d at 921.

[100] *Id.* at 926.

[101] 7 RR 12.

[102] 7 RR 13.

[103] 7 RR 50.

[104] *Id.*

laying down and he sees him shaking his head and the person with the I.V. is going like this. And that's it. There's no I.V. in her hand even. It's just a bag and he can't hear or see what's going on. At that point he says, those are exigent circumstances, I call Rodriguez? . . . That's not credible."[105]

- "I'm entering a finding that they're not credible. Okay. That the officer's testimony with regards to what formed the basis for the exigency in his mind, is not credible."[106]

- "The fact is that it's not credible. The Court is making a finding based upon the testimony of all the witnesses, including the medical witnesses, especially the medical witnesses, especially the phlebotomist, that says that the determination that these officers are trying to convince or put forth that there were exigent circumstances that blood was going to be drawn or that an I.V. was about to occur, is not credible."[107]

- "It's not credible based upon the evidence. The Court is in its -- in its rule (sic) as the trier of fact, which even the supreme court, everybody says, the Court makes that decision based upon because he can see the demeanor of the witnesses, the Court can listen to all the evidence, evaluate the totality of the circumstances."[108]

- "My ruling is that he's not credible and that there were no exigent circumstances and he should have had a warrant."[109]

- "There were no exigent circumstances to justify a warrantless blood draw. And Officer Lom's and Officer Torres' testimony is

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[105] 7 RR 50–51.

[106] 7 RR 51.

[107] 7 RR 52.

[108] 7 RR 53.

[109] 7 RR 54.

not credible with regards to their assessment and the reasonableness of their conclusion that exigent circumstances existed."[110]

- "And his assessment of what was going on is in error, is not credible. That his testimony is not consistent with the testimony of all the other witnesses there at the time."[111]

- "It does not find the testimony of Officer Lom credible with regards to his determination in his mind that exigency existed to interfere."[112]

- "That again, goes to the Court's determination that Officer Lom's testimony and Officer Torres' testimony is not credible concerning the so-called quote, unquote exigent circumstances existing at the time to draw the blood."[113]

- The Court has specifically indicated that Officer Lom -- and if Officer Torres is in agreement with Officer Lom and I think Officer Torres was basically reacting to Officer Lom and deferring to his -- to the fact that he had been on the force longer, that their assessment is not credible with regards to the exigent circumstances that would warrant a warrantless blood draw, so those are suppressed."[114]

- "And as far as the exigent circumstances that the State is relying on based upon the testimony of Officer Lom and Torres, again,

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[110] 7 RR 57.

[111] 7 RR 104.

[112] 7 RR 106.

[113] 7 RR 107.

[114] 7 RR 124.

I've already made a determination on that, that that was not credible."[115]

- "I don't believe that Officer Lom is credible."[116]

These were also findings of historical fact, much akin to a fact finder deciding whether a defendant committed a crime intentionally. Thus, the court of appeals was required to give almost total and complete deference to these findings.[117] The court of appeals, again, completely failed to do so in coming to its conclusion that exigent circumstances existed. Because, as the trial court found, the officers' belief that medical personnel were going to inject Appellee with an I.V. was not credible, this provides no support for that conclusion of law.

E. The court of appeals failed to consider the trial court's multiple, explicit findings that the theory that the blood would be compromised by the I.V. was entirely speculative and had no basis or evidence to support it.

The court of appeals then reasoned that this injection of saline or other medication, (even though the trial court found that it was not going to happen) "would likely compromise the blood sample by impeding the

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[115] 8 RR 12.

[116] 8 RR 14.

[117] *Ross*, 32 S.W.3d at 855.

ability to determine the rate of dissipation."[118] Again, this was entirely contrary to the trial court's findings based on the evidence presented:

- "And the Court will just make a note on the record that even if -- let's say for example, there had been an I.V. performed on the defendant, there's no evidence before the Court, except general speculative evidence, that an I.V. would maybe dilute the blood. To what extent, there was no evidence involved.[119]

- "That in making the Court's finding, even the Court will note even if, let's say for example, there's no testimony here before the Court, the mere fact that he might have taken, let's say, or if there had been an I.V. done or about to be done, at approximately 3:10, 3:15, whatever, that a lot depends on how the I.V. works, how, if it's a drip, how much is being dripped into the I.V. and being injected into the defendant, that would dissipate any, any evidence of alcohol in the blood. There's no evidence to indicate that. That that, in and of itself, is speculative and of no value in the Court's determination as to what extent and to how diluted the blood would have been."[120]

- "As far as the evidence concerning the I.V., the Court has no evidence before it concerning how an I.V. would affect the blood. Whether it would -- how long it would take for it to dissipate the alcohol level in the blood to the extent where it would just completely rid the blood of any indication of alcohol, we don't know. There's no evidence that would substantiate any sort of a speculation with regards to that, just general conclusions that it would have some impact."[121]

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[118] *Garcia*, 2017 WL 728367 at *12, slip op. at 26.

[119] 7 RR 105.

[120] 7 RR at 108.

[121] 8 RR 13.

- "So there's no evidence to indicate how and to what extent that I.V., if it would have been given, how it would have been affected."[122]

This finding is consistent with one of the leading studies on the topic by Drs. James Li, Trevor Mills, and Ray Erato and published in *The Journal of Emergency Medicine*.[123] In their study, they noted a trend in the southern United States for emergency departments to administer I.V. fluid therapy to help "sober up the patient more quickly" but noted the "lack of literature support" to show that I.V. fluids truly did that.[124] Accordingly, they sought out to determine if administering I.V. fluids actually affected the rate of alcohol (ethanol) elimination using "the guidelines for human research adopted by the American Medical Association and outlined in the Declaration of Helsinki."[125] Their study concluded

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[122] 8 RR 14.

[123] James Li, Trevor Mills & Ray Erato, *Intravenous Saline Has No Effect on Blood Ethanol Clearance*, 17 J. EMERGENCY MEDICINE 1 (1999) (abstract located at https://www.ncbi.nlm.nih.gov/pubmed/9950378; full copy attached as Appendix to this brief).

[124] *Id.* at 1. Dr. Kavonian's testimony that a saline I.V. "could probably dilute any type of solvent" in the blood, 2 RR 118, is a perfect example of this unsubstantiated belief that the authors noted existed in emergency departments.

[125] J. Li, 17 J. EMERGENCY MEDICINE at 1.

that "that i.v. fluids do not accelerate physiologic ethanol clearance mechanisms" — entirely opposite of what Lom and other witnesses tried to present to the trial court.[126]

Indeed, if the injection of saline or other medication would "likely compromise the blood sample by impeding the ability to determine the rate of dissipation," then hundreds if not thousands of intoxicated driving convictions across this State are subject to question because those results were obtained from a hospital after presumably an I.V. was given to the suspect.[127] In short, the court of appeals disregarded not only the trial court's explicit factual findings, but regularly accepted scientific principles.

There is little doubt that exigent circumstances should be used rarely as a justification for a warrantless intrusion into a person's

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[126] *Id.* at 4.

[127] *See e.g. State v. Hardy*, 963 S.W.2d 516, 518 (Tex. Crim. App. 1997); *Kirsch v. State*, 276 S.W.3d 579, 582 (Tex. App.—Houston [1st Dist.] 2008, *aff'd* 306 S.W.3d 738 (Tex. Crim. App. 2010).

body.[128] If trial courts, like the one here, are not given the required deference to determine whether the facts support the justification, law enforcement will only continue to act first and then come up with excuses later, no matter how unbelievable they are. Worse, as this case establishes, is that anyone taken to a hospital, given just the *potential* of having substances injected to their body — despite how unreasonable and not credible that belief is — faces having their blood drawn without a warrant. For all these reasons, this Court should, pursuant to Texas Rule of Appellate Procedure 78.1(c), reverse the judgment of the court of appeals, affirm the trial court's judgment granting Appellee's motion to suppress, and order that this case be remanded back to the trial court for further proceedings.

GROUND FOR REVIEW TWO

THE COURT OF APPEALS ERRED BY CONSIDERING EVIDENCE THAT WAS NOT AVAILABLE TO LAW ENFORCEMENT AT THE TIME OF THE WARRANTLESS TAKING OF APPELLEE'S BLOOD AS PART OF ITS EXIGENT CIRCUMSTANCES ANALYSIS.

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[128] *See Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 1558, 185 L. Ed. 2d 696 (2013)(quoting *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)(noting that "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'").

A. The court of appeals consideration of evidence discovered months after the fact as part of their exigency analysis.

In its one paragraph of reasoning for reversing the trial court's judgment that no exigent circumstances existed, the court of appeals also noted that there was a concern that Appellee's "intoxication was induced by alcohol *and cocaine metabolites*."[129] Accordingly, the court of appeals concluded that Appellee was like the defendant in *Cole*, who officers believed to be intoxicated by methamphetamine and, therefore, "without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know — unlike alcohol's widely accepted elimination rate — how much evidence it was losing as time passed."[130]

The court of appeals, however, failed to recognize two critical, distinguishing facts. First, nowhere in its opinion did the court recognize that no evidence was presented to the trial court to support *any* belief — including that of officers and other witnesses at the scene of the accident or at the hospital — that Appellee's intoxication was "induced" by cocaine

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[129] *Garcia*, 2017 WL 728367 at *12, slip op. at 26 (emphasis added).

[130] *Id.* (quoting *Cole*, 490 S.W.3d at 926–27).

or cocaine metabolites in addition to alcohol.[131] Second, the scant evidence presented by the State to show that Appellee had cocaine metabolite in his blood came from the lab testing report issued more than three months after the night of the accident and the warrantless taking of Appellee's blood.[132]

B. The well-established rule that an exigent circumstances analysis requires an evaluation of the facts available to the officers at the time of the search.

In *Cole*, this Court recognized the well-established rule that, "An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer *at the time of the search*."[133] This can be traced back to the Supreme Court decision in *Terry v. Ohio*, where the Court noted that a warrantless search must "be strictly circumscribed by the exigencies which justify its initiation."[134] This was a continuation of the Court focusing on the circumstances faced by an officer at the time

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[131] One simply need search the entire reporter's record for the word "cocaine" and no such word was uttered by a single witness.

[132] See State's Exhibit 16, admitted at 3 RR 69 and located on page 271 of the PDF version of Volume 9 of the Reporter's Record.

[133] *Cole*, 490 S.W.3d at 923 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)(emphasis added).

[134] *Terry v. Ohio*, 392 U.S. 1, 26, 88 S. Ct. 1868, 1882, 20 L. Ed. 2d 889 (1968).

of the warrantless search in *Schmerber v. California*.[135] The Court noted there that the officer in that case "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, *under the circumstances*, threatened 'the destruction of evidence.'"[136]

Thirty years later, the Court added that, an "action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[137] This same principle was the basis for the Court's decision in *McNeely v. Missouri*, where the court noted that absent a warrant, "'the fact-specific nature of the reasonableness inquiry' . . . demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'"[138]

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[135] 384 U.S. at 770, 86 S. Ct. at 1835.

[136] *Id.* (emphasis added).

[137] *Stuart*, 547 U.S. at 404, 126 S. Ct. at 1948 (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978))(emphasis in original).

[138] *McNeely*, 569 U.S. at 150, 133 S. Ct. at 1559 (citations omitted).

This Court too, prior to *Cole*, recognized the importance of evaluating the facts and circumstances available to law enforcement at the time of a warrantless search. In *Brimage v. State*, this Court held that an objective standard of reasonableness in determining whether a warrantless search is justified under the Emergency Doctrine is to account for "the facts and circumstances known to the police at the time of the search."[139] Then, in *Colburn v. State* and *Laney v. State*, this Court again noted that it is to "apply an objective standard of reasonableness in determining whether a warrantless search is justified, taking into account the facts and circumstances known to the police at the time of the search."[140] Finally, in a case dealing with exigent circumstances as a basis to make warrantless entry into a home, this Court noted, "the determination of whether an officer has probable cause and exigent circumstances to enter . . . without a warrant is a factual one *based on the sum of all the information known to the officer at the time of entry*."[141]

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[139] *Brimage v. State*, 918 S.W.2d 466, 501 (Tex. Crim. App. 1994), on reh'g (Jan. 10, 1996).

[140] *Colburn v. State*, 966 S.W.2d 511, 519 (Tex. Crim. App. 1998); *see Laney v. State,* 117 S.W.3d 854, 862 (Tex. Crim. App. 2003).

[141] *Parker v. State*, 206 S.W.3d 593, 600 (Tex. Crim. App. 2006)(emphasis added).

One of the critical facts in *Cole* that weighed in favor of concluding that exigent circumstances justified the warrantless blood draw there was the fact that the appellant admitted using "meth" and witnesses observed that appellant's behavior was consistent with methamphetamine intoxication.[142] Hence, this information was "available to the officer [there] at the time of the search" and, as part of the exigency analysis, the trial court could consider the fact that the officer believed appellant's body would continue to metabolize the methamphetamine and there would be no way to know the rate at which it would be metabolized.[143] Such was not the case here.

C. There was no evidence presented in the record that any witness believed Appellee was under the influence of cocaine or cocaine metabolite at or prior to the time of the search.

Here, there was no evidence available to any witness that Appellee was intoxicated by cocaine or cocaine metabolite at the time of the search. Accordingly, Appellee was no different than the defendant in *McNeely*.

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[142] *Cole*, 490 S.W.3d at 920, 926–27.

[143] *Id*. at 923.

There, as in this case, the State attempted to justify the warrantless search of McNeely on the basis that the officer believed he was intoxicated by alcohol and that the natural dissipation of alcohol was an exigent circumstance in and of itself permitting them to draw McNeely's blood without a warrant.[144] The Supreme Court, however, rejected that argument, noting that, "[t]he context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a " 'now or never' " situation," in that "BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner."[145] In this case, Off. Rodriguez believed that Appellee was intoxicated by alcohol which was consistent with Appellee's admission that he had consumed three of four beers.

The only evidence in the record showing that Appellee had consumed cocaine or cocaine metabolite was the blood test results obtained well *after* the night of Appellee's arrest and the warrantless search: a lab

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[144] *McNeely*, 569 U.S. at 153, 133 S. Ct. at 1561.

[145] *Id.*

report that showed the presence of only benzoylecgonine (cocaine metabolite).[146] While the presence of that substance would tend to show that Appellee may have consumed cocaine or cocaine metabolite at some undeterminable point in the past,[147] there was no evidence (1) that Appellee admitted to consuming cocaine or cocaine metabolite at or before the time of the accident (unlike the appellant in *Cole* who admitted using "meth") and (2) that anyone — law enforcement officers, civilian witnesses, emergency medical personnel or hospital staff — had any reason to believe or suspect that Appellee had consumed cocaine or cocaine metabolite, or that his intoxication was "induced" by reason of the introduction of cocaine or cocaine metabolite into his system (unlike the witnesses in *Cole* who saw signs consistent with methamphetamine intoxication).[148]

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[146] See State's Exhibit 16, admitted at 3 RR 69 and located on page 271 of the PDF version of Volume 9 of the Reporter's Record.

[147] *See Manning v. State*, 114 S.W.3d 922, 924 (Tex. Crim. App. 2003)(discussing evidence of cocaine metabolite); *Layton v. State*, 280 S.W.3d 235, 241–42 (Tex. Crim. App. 2009)(holding evidence of ingestion of a drug is irrelevant and inadmissible without testimony establishing that the drug caused some actual intoxication).

[148] *See Manning*, 114 S.W.3d at 924 (noting testimony that, at a level of .15 mg/l of benzoylecgonine, the defendant would not be feeling any of the effects of cocaine).

The court of appeals failed to recognize the well-established law set forth by this Court and the Supreme Court, failed to recognize the lack of evidence showing that any witness believed that Appellee was intoxicated by cocaine or cocaine metabolite, and erred by considering evidence discovered months after the warrantless taking of Appellee's blood as part of its exigent circumstances analysis. By doing so, it set an improper precedent whereby a court can consider something beyond what facts are available to an officer at the time of the search, even looking to evidence discovered months after that critical time as what occurred in this case. Accordingly, pursuant to Texas Rule of Appellate Procedure 78.1(c), this Court should reverse the judgment of the court of appeals, affirm the trial court's judgment, and order that this case be remanded back to the trial court for further proceedings.

PRAYER FOR RELIEF

WHEREFORE, Appellee prays that this Honorable Court reverse the judgment of the court of appeals, affirm the trial court's judgment, and order that this case be remanded back to the trial court for further proceedings.

Respectfully submitted,

/s/ T. Brent Mayr
T. BRENT MAYR
State Bar No: 24037052
5300 Memorial Dr., Suite 750.
Houston, Texas 77007
Tel.: 713-808-9613
Fax: 713-808-9991
E-mail: bmayr@bmayrlaw.com

/s/ Richard D. Esper
RICHARD D. ESPER
State Bar No.: 06667500
Esper Law Office
801 N. El Paso St.
El Paso, TX 77002
Tel.: 915-544-3132
Fax: 915-532-3455
richardesperlaw@yahoo.com

ATTORNEYS FOR JOEL GARCIA

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been served on to the attorney for the State, Lily Stroud, El Paso County District Attorney's Office, and on Stacey M. Soule, State Prosecuting Attorney, pursuant to Texas Rule of Appellate Procedure 9.5 (b)(1), through Appellee's counsel's electronic filing manager on October 11, 2017.

/s/ T. Brent Mayr
T. Brent Mayr
ATTORNEY FOR JOEL GARCIA

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(B) and 9.4(i)(3), undersigned counsel hereby certifies that this computer-generated document contains 8,532 words as calculated by the word count feature contained within the program used to prepare said document, namely, Microsoft Word 365.

/s/ T. Brent Mayr
T. Brent Mayr
ATTORNEY FOR JOEL GARCIA

APPENDIX

The Journal of Emergency Medicine, Vol. 17, No. 1, pp. 1–5, 1999

0736-4679/99 $–see front matter

PII S0736-4679(98)00120-6

Original Contributions

INTRAVENOUS SALINE HAS NO EFFECT ON BLOOD ETHANOL CLEARANCE

James Li, MD, Trevor Mills, MD, and Ray Erato, MD

Mount Auburn Hospital, Department of Emergency Medicine, Cambridge, Massachusetts
Reprint Address: James Li, MD, Mount Auburn Hospital, Department of Emergency Medicine, 330 Mount Auburn Street, Cambridge, MA 02238

□ **Abstract—For patients presenting to emergency departments with ethanol intoxication, intravenous (i.v.) fluids are initiated for varied reasons. This investigation determined the effect of i.v. fluid therapy on the rate of blood ethanol clearance in such patients. Volunteers received a predetermined dose of ethanol on two separate occasions. On the second occasion, volunteers rapidly received a liter of i.v. saline directly following ethanol ingestion. At intervals on both occasions, blood ethanol levels were estimated using a breath analyzer. Using linear regression analysis, no difference was found in rates of alcohol clearance with or without i.v. fluid intervention. The common rate of clearance between both groups was 15 mg/dL/h (95% CI 12 to 18). We conclude that i.v. fluid therapy does not accelerate ethanol clearance in intoxicated patients. While such therapy may be justified for other reasons, practitioners are cautioned against initiating fluids in such patients solely to expedite ethanol elimination.** © 1999 Elsevier Science Inc.

□ **Keywords—ethanol; alcoholic intoxication; alcoholism; fluid therapy**

INTRODUCTION

In the southern United States, we have observed the liberal use of intravenous (i.v.) fluid therapy for the treatment of patients presenting to emergency departments with acute ethanol intoxication. Despite a lack of literature support, one common rationale for this practice has been "to sober up the patient more quickly." A survey we conducted of 60 emergency practitioners in one public teaching hospital revealed 87% considered i.v. fluid administration a viable therapy for decreasing time to sobriety.

A more defendable rationale has been to treat those intoxicated patients presenting with either hypovolemia or malnourishment. In our practice, however, we have observed both that the majority of patients with acute ethanol intoxication have not been demonstrably hypovolemic and that nutrition can be easily provided orally at significant cost savings.

For some time, we have been curious as to the validity of the first rationale, and having found no previously documented evidence to support the claim that i.v. fluid therapy affects physiological ethanol clearance, we decided to test this rationale.

MATERIALS AND METHODS

Five men and five women aged 23 to 36 years volunteered to participate in this crossover study. Participants were advised of risks and consented for the study. As these volunteers were neither patients nor hospital-based employees, institutional review was unavailable. For this reason, following discussion with both investigators and volunteers, the study was designed in accordance with the guidelines for human research adopted by the American Medical Association and outlined in the Declaration of Helsinki (1).

Original Contributions is coordinated by *John A. Marx*, MD, of Carolinas Medical Center, Charlotte, North Carolina

RECEIVED: 15 August 1997; FINAL SUBMISSION RECEIVED: 11 February 1998;
ACCEPTED: 6 March 1998

This investigation was designed as a crossover study with subjects acting as their own controls. Participants met on 2 separate days, 4 days apart. At the initial meeting, study subjects first completed the Michigan Alcoholism Screening Test (2). Chronic alcoholism, as determined by this screening test, was chosen as an exclusion criterion. Additional exclusion criteria were illnesses or medication use that could alter hepatic metabolism. Subjects had been prohibited from alcohol consumption or food within 24 and 2 h of the study, respectively. Age, height, weight, and gender for each subject was recorded. Subjects then received 0.81 g/kg ethanol by mouth in the form of straight vodka or whiskey, which was calculated to produce a target blood alcohol level (BAL) of 150 mg/dL using the formula BAL = [mg ethanol ingested]/[(L/kg Vd)(kg weight)(10)] (3). Undiluted liquor was chosen as the vehicle for ethanol to minimize the amount of free fluid administered.

Breath alcohol readings on each study subject were obtained prior to and 20 min following ethanol administration, and continued at 20-min intervals for between 4 and 6 h, providing for approximately a dozen readings per subject.

At the second meeting four days later, subjects were given identical amounts of ethanol. Directly following, one liter of normal saline solution was administered i.v. at a wide open rate to each subject. Breath alcohol readings were obtained as before. In addition, subjects were queried on change in symptoms following i.v. fluid administration.

Blood ethanol levels were estimated using the Alco–Sensor III breath alcohol testing device manufactured by Intoximeters, Inc. (St. Louis, MO). Calibration of the device was performed according to the manufacturer's instructions prior to each reading. This device was chosen for three reasons. First, published reports confirmed its accuracy when compared with actual blood samples (4–7). Second, readings taken with this device had been accepted by law-enforcement agencies for evidential purposes (8–11). Third, the Alco–Sensor III was both noninvasive and simple to use. After investigators had been instructed on its use, test readings taken by separate investigators were identical.

Data analysis was performed using both simple linear regression and comparison of linear regression slopes as described by Zar (12).

RESULTS

All study participants scored zero on the Michigan Alcohol Screening Test, meeting criteria to exclude chronic alcoholism. All participants were healthy and took no medications on a regular basis. Subjects' weights ranged from 50 to 82 kg.

Two linear regression models were derived from the data, the first for the control group and the second for the crossover group receiving i.v. saline (Figures 1 and 2). Data points for the control group numbered 112, and for the experimental group, 128.

Comparison of slopes revealed no difference between the control and experimental groups. As the slope of each model was defined as the rate of ethanol clearance in mg/dL/h, this demonstrated that i.v. fluid therapy had no effect on physiologic ethanol clearance. The slope for the control group was 16 mg/dL/h (95% CI 13 to 18). The slope for the group receiving i.v. therapy was 15 mg/dL/h (95% CI 13 to 17). The common (or weighted) clearance rate calculated by linear regression analysis was 15 mg/dL/h (95% CI 12 to 18).

No participants reported subjective changes in their degrees of intoxication following fluid administration. However, spontaneously noted inspiratory chest pain immediately followed i.v. infusion in five of the ten participants. No crackles were noted on examination of these subjects and pain spontaneously disappeared within the study period.

DISCUSSION

A number of limitations are present in this study. First, crossover was performed arbitrarily, first without and subsequently with i.v. fluid infusion. Randomization of crossover would have aided in elimination of possible confounding factors. Second, due to study design, blinding of recorders was not possible. Such blinding could have eliminated additional bias. Third, i.v. infusion volume was arbitrarily given as a single liter infusion, which was thought to best mimic clinical practice. However, weight-basing infusion volume may have yielded differing results. Finally, the overall number of subjects sampled was small. Despite our efforts to select healthy study participants, and despite collection of a large number of data points sufficient to yield statistical significance, our subject sample may not have represented the general populace if unforeseen factors were present. [In fact, this limited our ability to make conclusions for a second subgroup analysis. Confirming previous work, we observed a significant difference in ethanol clearance rates between men and women in our study group, with men clearing more slowly than women (13). However, the group (five women and seven men) participating in this gender comparison was too small a sample from which to make conclusions about the general population.]

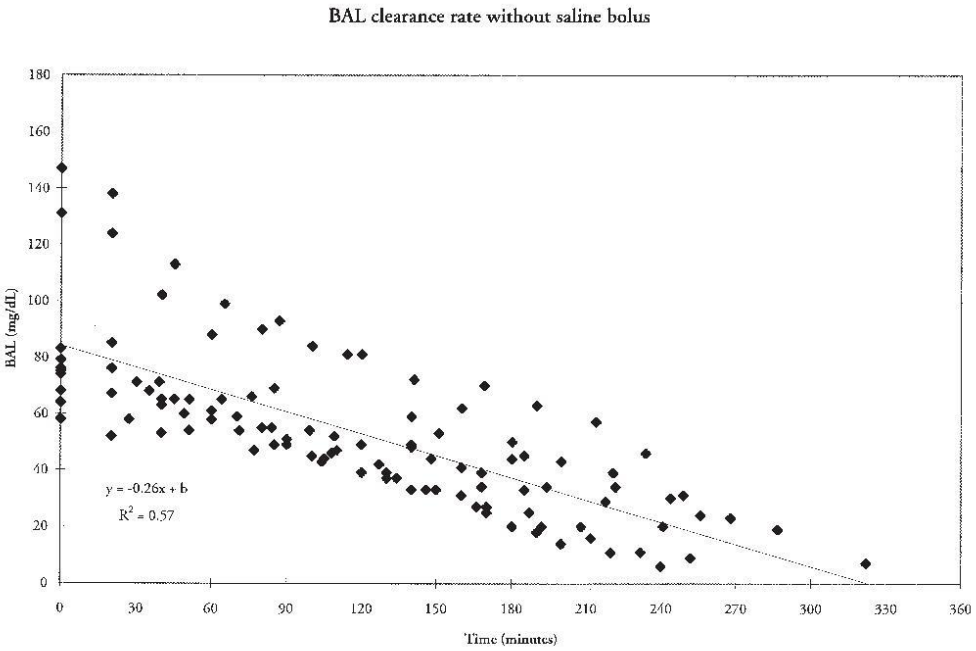

Figure 1. Linear regression model for control group. BAL, blood alcohol level.

Ethanol intoxication accounts for a significant portion of emergency department visits. One British study found that 40% of all evening emergency department patients had been drinking ethanol and that one-third were legally intoxicated (14).

In our experience, we have noted that large numbers of such patients receive i.v. fluid therapy. Of the various reasons for this practice, we found a widespread regional belief that i.v. therapy both speeds recovery to a nonintoxicated state and serves to treat presumed hypovolemia. Much effort has been expended in the search for a rapid reversal agent useful to emergency physicians in the treatment of acute ethanol intoxication. Repeated investigations have demonstrated the ineffectiveness of caffeine (15), naloxone (16–18), and flumazenil (19). To date, the only treatment known to be effective for the enhancement of blood ethanol clearance is hemodialysis (3). The present study demonstrates that i.v. fluid therapy has no role in accelerating the physiologic elimination of ethanol.

The fact that many intoxicated patients are not demonstrably hypovolemic is perhaps tempered with the belief that i.v. volume replenishment is unlikely to harm euvolemic patients. In our series of healthy euvolemic subjects, half of the participants experienced transitory chest pain during relatively small saline boluses. The clinical significance of this finding is unknown but is not likely to be beneficial. Such a finding may signal risk for the population of euvolemic intoxicated patients with underlying cardiac or pulmonary disease.

The notion that "all alcoholics are dehydrated" has been challenged by many authorities (20). Indeed, complex changes in cortisol, vasopressin, and antidiuretic hormone secretion found in chronic alcoholism result in an ultimate state of isotonic overhydration (21,22). Thus, fluid therapy should not be given indiscriminately to intoxicated patients (23).

Arguments other than enhancement of clearance mechanisms exist for i.v. use in acute intoxication. Hypovolemia resulting from ethanol-related diuresis, vomiting, or diarrhea may be present during acute alcohol intoxication (24). In cases of vomiting, hypovolemia may be treated with i.v. fluid. However, it is our bias that many intoxicated patients are capable of receiving volume replenishment by mouth, particularly since these same patients derived their intoxication via the oral route to begin with.

In some centers, acutely intoxicated patients with

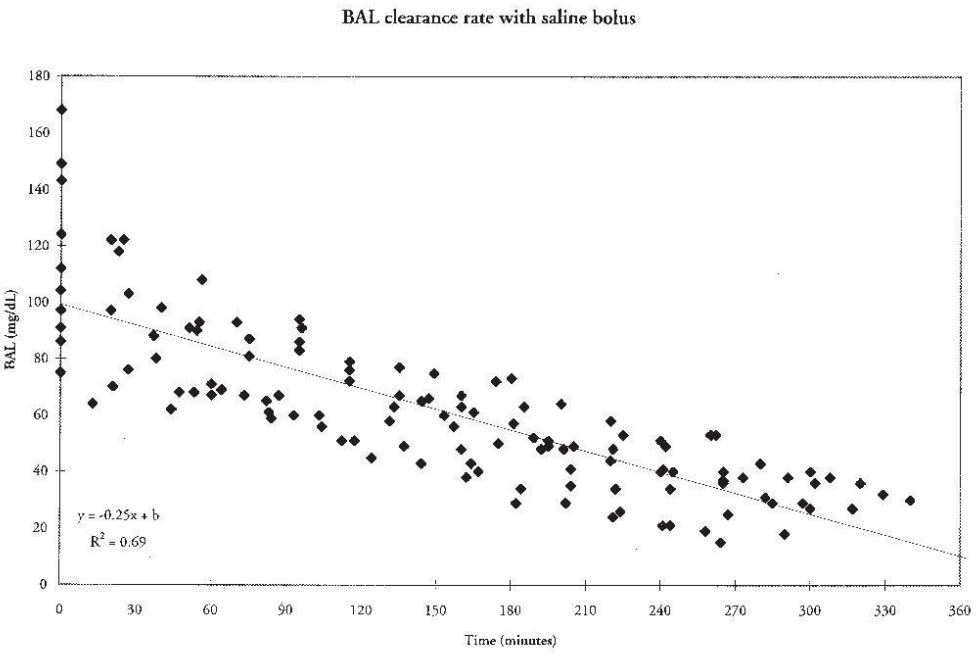

Figure 2. Linear regression model for crossover group. BAL, blood alcohol level.

chronic alcoholism are routinely treated with i.v. therapy designed to replenish nutrients commonly depleted in this population. The "banana bag," as it has been termed, consists of maintenance fluid to which is added a multivitamin solution, giving the fluid a yellowish color. Use of a multivitamin solution alone, however, fails to address the potential electrolyte abnormalities present in this population. For this reason, one study recommends using a solution of 5% dextrose in 0.45% saline, to which has been added per liter 20 mEq of potassium phosphate, 20 mEq of potassium chloride, and 2 g of magnesium sulfate (25). Nevertheless, such therapy, even in those patients who are demonstrably hypovolemic, may worsen ethanol-induced hypophosphatemia (26–29) or congestive cardiomyopathy (30–34).

It is also our belief that the benefit of multivitamin therapy is likely less than the benefit of a single meal in this population of poorly nourished patients (20). Multivitamins may also be administered orally instead of i.v. in patients who are able to take them, at a significant cost and time savings (25,35).

In summary, use of i.v. fluid therapy in alcohol-intoxicated patients is commonplace and has several potential justifications. Nevertheless, routine treatment of all intoxicated patients with i.v. fluids is potentially dangerous, since many of these patients may in reality be overhydrated, hypophosphatemic, or have an underlying alcohol-induced cardiomyopathy. Intoxicated patients who require fluid or nutritive replenishment may be able to receive such replenishment by mouth. This study additionally demonstrates that i.v. fluids do not accelerate physiologic ethanol clearance mechanisms.

REFERENCES

1. 41st World Medical Assembly. Declaration of Helsinki: recommendations guiding physicians in biomedical research involving human subjects. Bull Pan Am Health Organ 1990;24: 606–9.
2. Pokorny AO, Miller BA, Kaplan HB. The brief MAST: A shortened version of the Michigan Alcoholism Screening Test. Am J Psychiatry 1972;129:342–5.
3. Osborn H. Ethanol. In: Goldfrank LR, ed. Toxicologic Emergencies. 5th ed. Norwalk: Appleton & Lange; 1994:813–24.
4. Alco-Sensor III Manual. St. Louis: Intoximeters, Inc; 1992.

5. Jones AW. Evaluation of breath-alcohol instruments. III. Controlled field trial with Alcolmeter pocket model. Forensic Sci Int 1985;28:147–56.
6. Wenzel J, McDermott FT. Accuracy of blood alcohol estimations obtained with a breath alcohol analyzer in a casualty department. Med J Aust 1985;142:627–8.
7. Jones AW, Beylich KM, Bjorneboe A, et al. Measuring ethanol in blood and breath for legal purposes: variability between laboratories and between breath-test instruments. Clin Chem 1992;38: 743–7.
8. Dubowski KM, Essary NA. Field performance of current generation breath-alcohol simulators. J Anal Toxicol 1992;16:325–7.
9. Bittmann K. Proof of alcoholic intoxication in automobile driving by breath alcohol content in Austria from the legal viewpoint. Blutalkohol 1993;30:344–8.
10. Levitt S. Department of transportation 1995 regulations for alcohol testing: policy changes and compliance issues. AAOHN J 1996; 44:138–40.
11. Dubowski KM. Quality assurance in breath-alcohol analysis. J Anal Toxicol 1994;18:306–11.
12. Comparing simple linear regression equations. In: Zar JH, ed. Biostatistical Analysis. 3d ed. Upper Saddle River, NJ: Prentice–Hall; 1996:353–69.
13. Taylor JL, Dolhert N, Friedman L, et al. Alcohol elimination and simulator performance of male and female aviators: a preliminary report. Aviat Space Environ Med 1996;67:407–13.
14. Holt S, Stewart IC, Dixon JM. Alcohol and the emergency service patient. Br Med J 1980;281:638.
15. Nuotto E. Coffee and caffeine and alcohol effects on psychomotor function. Clin Pharmacol Ther 1982;31:68–72.
16. Mackenzie AI. Naloxone in alcohol intoxication. Lancet 1979;1: 733–6.
17. Guerin J, Friedberg G. Naloxone and ethanol intoxication. Ann Intern Med 1982;97:932–6.
18. Nuotto E, Palva ES. Naloxone fails to counteract heavy alcohol intoxication. Lancet 1983;2:167–70.
19. Fluckiger A, Hartmann D, Leishman B, Zeigler WH. Lack of effect of the benzodiazepine antagonist flumazenil and the performance of healthy subjects during experimentally induced ethanol intoxication. Eur J Clin Pharmacol 1988;34:273–6.
20. McMicken DB. Alcohol-related disease. In: Rosen P, Barkin R, ed. Emergency Medicine. 4th ed. St. Louis: Mosby–Year Book; 1998: 1277.
21. Schuckit MA. Alcoholism and drug dependency. In: Isselbacher KJ, Braunwald E, Wilson JD, et al., eds. Harrison's Principles of Internal Medicine. 13th ed. New York: McGraw–Hill; 1994:2422.
22. Bukata WR. Ethanol withdrawal in the primary care setting. Emerg Med Abstracts 1996;20:2.
23. Watson TD, Lee JF. Preanesthetic care: Intoxication and trauma. Clin Anesth 1976;11:31–8.
24. Sullivan JF, Wolpert PW, Williams R. Serum magnesium in chronic alcoholism. Ann NY Acad Sci 1969;162:947–55.
25. Knochel JP. Hypophosphatemia (nutrition in medicine). West J Med 1981;134:15–26.
26. Stein JH, Smith WO, Ginn E. Hypophosphatemia in acute alcoholism. Am J Med Sci 1966;252:78–83.
27. Lentz RD, Brown DM, Kjellstrand CM. Treatment of severe hypophosphatemia. Ann Intern Med 1978;89:941–4.
28. Linderman RD, Pappen S. Therapy of fluid and electrolyte disorders. Ann Intern Med 1975;82:64–70.
29. Bluntzer ME, Blachley JD. Acid-base and electrolyte disturbances induced by alcohol. J Crit Illness 1986;1:19.
30. Talbott GD. Primary alcoholic heart disease. Ann N.Y. Acad Sci 1975;252:237–42.
31. Segel LD, Klousner SC, Gnadt JT, Amsterdam EA. Alcohol and the heart. Med Clin North Am 1984;68:147–61.
32. Shanoff HM. Alcoholic cardiomyopathy: an introductory review. Can Med Assoc J 1972;106:57–62.
33. Alexander CS. The concept of alcoholic myocardiopathy. Med Clin North Am 1968;52:1183–91.
34. Gunnar BM, Demakis J, Rahimtoola SH. Clinical signs and natural history of alcoholic heart disease. Ann N.Y. Acad Sci 1975;252: 264–72.
35. Krishel S, SaFranek D, Clark RF. Intravenous vitamins for alcoholics in the emergency department: a review. J Emerg Med 1998; 16:419–24.